In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 515

ALFRED LEE WEINBERG AND MORGAN BIRD, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 29-49) is reported at 226 F. 2d 161. The opinion of the District Court appears at 129 F. Supp. 514.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1955, and a petition for rehearing was denied on October 14, 1955. The petition for a writ of certiorari was filed on November 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment is sufficient to charge a conspiracy to defraud the United States.

2. Whether it was error to permit the use of grand-jury testimony to refresh the recollection of witnesses at the trial.

3. Whether it was error to admit evidence of substantive crimes incidental to the proof of the conspiracy and to exclude certain receipts offered in refutation thereof when such receipts were in contradiction of petitioners' own books.

4. Whether, in the circumstances, the testimony of petitioners' former attorney was inadmissible as being privileged.

5. Whether the court committed prejudicial error in its charge to the jury.

6. Whether petitioners received a fair and impartial trial.

STATUTE INVOLVED

18 U. S. C. 371:

> Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Petitioners were convicted in the United States District Court for the Middle District of Pennsylvania of conspiracy to defraud the United States. Each was sentenced to pay a fine of five thousand dollars and to serve a term in prison, petitioner Weinberg for two years and petitioner Bird for a year and a day (R. 481a-482a). On appeal, the convictions were affirmed.

The indictment (R. 10a-17a) alleged that petitioners organized and controlled five trade schools for the education and training of veterans; that these schools entered into contracts with the Veterans' Administration under which the latter was to compensate the former for tuition and for supplies furnished to veteran students, allowing, as to supplies, a percentage above actual, true cost to the schools; and that the schools were required to furnish statements of the actual cost of operation and supplies to enable the Administration to determine the rate of compensation. The fraud charged was that petitioners organized a separate corporation, known as Mercury Distributors, Inc., in which they were stockholders, which purchased tools and supplies at wholesale and then resold them to the schools at inflated prices above those which the schools would have had to pay if they had made the purchases directly. The inflated prices were submitted to the Veterans' Administration as representing actual cost of the supplies.

It is not disputed that the Mercury corporation was established as alleged and that Mercury's

mark-up on supplies purchased and resold to the schools was between 31 and 35% (R. 88a-89a). The contracts with the Veterans' Administration provided that the actual charge to the Veterans' Administration for tools was to be determined by the *actual costs* plus a percentage of these costs as a profit for handling (excerpts of exhibits printed at R. 425a-456a). Public Law 346 and regulations promulgated thereunder established requirements for such contracts and provided, *inter alia,* that the schools would be reimbursed for the cost of the tools, plus 10% as compensation for handling and issuing them, and that when tools were purchased from an outside source they would be billed at cost to the institution (Gov. Ex. G-8; R. 235b). There was evidence that the schools could have purchased the tools at the same price Mercury paid for them (R. 7b, 29a, 32a).

It was also shown that petitioners bought the Crown Body and Fender School, changed its name to Parker, and billed the Veterans' Administration for tools purchased by Crown from the Scott Company for a much greater amount than Crown had contracted to pay for them (R. 9b). Petitioner Weinberg caused Scott to rebill the tools to Mercury for the purpose of having Mercury inflate the price to Parker. There was evidence of a similar transaction with respect to tools bought by Crown from Franconi Auto Parts (R. 14b).

ARGUMENT

1. Petitioners contend (Pet. 10-14) that the conspiracy indictment fails to state an offense since it

does not charge the violation of a federal statute. The conspiracy statute, however, relates, not only to conspiracy to commit an offense independently defined, but to conspiracy to defraud the United States "in any manner or for any purpose." Thus, if the object of a conspiracy is to deprive the United States of its rights and privileges or the proper functioning of any agency through which it acts, the offense is complete. See *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *Haas* v. *Henkel,* 216 U. S. 462, 479; *United States* v. *Furer,* 47 F. Supp. 402, 405 (S. D. Cal.). As Judge Learned Hand stated in *Falter* v. *United States,* 23 F. 2d 420, 423 (C. A. 2):

> * * * While there are no crimes against the United States, except by statute, any fraud upon the United States is of a public character, and would at common law have itself been a crime, and quite independently of that a conspiracy to defraud the United States would also have been criminal. The section [18 U. S. C. 371] is at least coextensive with a conspiracy at common law, and indeed covers much more. Haas v. Henkel, 216 U. S. 462 * * *.

These cases dispose of petitioners' argument that they could not be guilty of conspiracy to defraud because there is nothing inherently illegal in the organization of a corporate middleman. See also *Lutwak* v. *United States,* 344 U. S. 604. The crucial consideration in a conspiracy to defraud is

not whether the steps in a scheme appear, on their face, legitimate or illegitimate, but whether there is a plan and purpose to cheat the United States. Here, the jury by its verdict has found that the creation of the supplier corporation as petitioners' *alter ego* was a part of a scheme by which the petitioners aimed to defraud the Government. There can be no doubt that petitioners established Mercury as a middleman in order to increase the amount which the Veterans' Administration would pay to schools which they also controlled, and that the intent was to defraud the United States as to the true cost of supplies to the schools. Their actions with respect to the Parker school (*supra*, p. 4) illustrate the point dramatically and are plainly irreconcilable with any conclusion other than that reached by the jury.

2. During the direct examination of three of the government witnesses, the prosecution asked the trial judge to read to the witnesses excerpts from their testimony before the grand jury (R. 54a, 189a, 197a). The judge did so, on authority of *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (R. 54a), offering to let the petitioners see that part of the testimony which was read (R. 193a).[1] The court said that it would instruct the jury as to the use of such testimony (R. 191a, 198a-199a) but failed to do so in its final instructions.

---

[1] In the *Socony-Vacuum* case, this Court stated (p. 233) that the "use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge."

Petitioners did not call the court's attention to this omission.

Petitioners argue that, in the absence of the limiting instruction, the grand-jury testimony read to the witnesses was improperly left before the jury as affirmative testimony, and that this error required reversal. The Court of Appeals, while assuming that the instruction should have been given, found that, under the facts of this case, the error was harmless (Pet. App. 38). The court pointed out that witnesses Shaffer and O'Brien affirmed their grand-jury testimony (R. 54a-57a), except for two answers which O'Brien did not recall "as such" (R. 190a). And, as pointed out in detail in the opinion below (Pet. App. 38), although the third witness, Yekel, played with words in an attempt to restrict his answers before the grand jury, he did not essentially contradict his earlier testimony. The grand-jury testimony did not, therefore, add any significant facts. Indeed, the basic facts as to the organization of Mercury and the operation of the scheme were undisputed, the real question being the intent with which the scheme was operated.[2] Under these circumstances, the Court of Appeals properly held that the absence of the limiting instruction was not prejudicial error, particularly since counsel failed to call the trial judge's attention to his oversight.

---

[2] These circumstances distinguish this case from *Young* v. *United States*, 214 F. 2d 232 (C.A. D.C.), relied upon by petitioner, which involved the principal witness for the government, a person whose testimony was of central importance on the issue of guilt or innocence.

The further argument that petitioners should have been permitted to examine all of the evidence given by the three witnesses to the grand jury (Pet. 16-17; R. 193a) is foreclosed by *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-234; see also *Metzler* v. *United States*, 64 F. 2d 203, 206 (C.A. 9).

3. (a) A Federal Bureau of Investigation accountant examined the books and records of the schools and of the Mercury company. He testified that two of the schools had been reimbursed by the Veterans' Administration for more tools than they had delivered to their students (R. 151a, 159a). Also, evidence that the rent for the Lee School was overstated in its cost statement was brought out by the government in the re-cross examination of petitioner Weinberg (R. 313a, 239b). Petitioners contend that the above testimony should not have been admitted, claiming that it related to crimes not connected with the conspiracy for which petitioners were indicted and that there was no showing that petitioner Bird had anything to do with those offenses (Pet. 19).

Although the organization and use of Mercury was the heart of the indictment, the charge was conspiracy to defraud the United States. The indictment reads (R. 13a-14a):

> * * * The *said defendants agreed* that the defendant Weinberg would cause * * * the said Schools to submit to the Veterans Administration an inflated cost of operation as a basis for determining the tuition rate to be paid said Schools and to present vouchers and claims

upon the United States to the Veterans Administration for reimbursement for the cost of said books, supplies, and equipment at the inflated prices. [Emphasis added.]

The challenged testimony was proof of the very plan or scheme charged in the indictment, the evidence involving transactions and events related in time, character and place of commission to the conspiracy. See *Lovely* v. *United States,* 169 F. 2d 386, 391 (C. A. 4). The acts in question were an integral part of the overall picture of fraud developed by the government. See *Leeby* v. *United States,* 192 F. 2d 331, 335 (C. A. 8); *Green* v. *United States,* 176 F. 2d 541, 543 (C. A. 1). And since they were part of the conspiracy, the testimony was properly admissible against Bird as well as Weinberg.

(b) Petitioners contend that, under the Federal Shop Book Rule, 28 U. S. C. 1732, they should have been allowed to rebut the foregoing testimony of the accountant by introducing receipts for tools given to their school by students (Pet. 21). The trial court properly excluded the receipts offered (R. 243a). Nothing less than a comparison of the total number of receipts with the total charges to the Veterans' Administration would have had any probative force. Moreover, as the court below pointed out, petitioners' effort was to contradict their own books, which were the basic records of the type to which the shop book rule relates.

4. Louis Shaffer, named in the indictment as a

co-conspirator but not indicted (R. 12a), acted as an attorney for the petitioners in organizing the schools and Mercury. He executed and endorsed notes for Parker School and Mercury (R. 53a). He testified that he was secretary of the various Bird-Weinberg corporations, including Mercury (R. 39a). He testified in detail as to meetings of the incorporators, stockholders and directors and as to what occurred at those meetings as revealed by the minutes (R. 40a-49a; 18b-36b). He also stated that Weinberg consulted him regarding the organization of Mercury, and that Weinberg and Bird came to his office on that matter in late January or early February, 1949 (R. 31b). It also appeared that, on March 1, 1949, Bird and Weinberg purchased a building, taking title in the name of Shaffer (R. 23b), and that the Lee School rented the building from Shaffer (R. 170b). Shaffer testified that he had not represented Bird before he took title to the Lee School property (R. 32b-34b).

Shaffer's testimony did not, as petitioners contend (Pet. 17), violate the attorney-client privilege. In acting as a secretary, Shaffer was not acting in his professional capacity as an attorney and his testimony with respect to meetings and what occurred there was admissible. *Pollock* v. *United States,* 202 F. 2d 281, 286 (C. A. 5). So far as the organization of Mercury is concerned, it is settled that the presence of a third person (Bird) at a conversation between attorney and client destroys the confidential character of the communication, unless the presence of the third person was indispensable to the communication. *Himmelfarb* v.

United States, 175 F. 2d 924, 939 (C. A. 9); *United States* v. *Olmstead,* 7 F. 2d 760, 763 (W. D. Wash.). It also seems clear that Shaffer was acting as an agent, and not as an attorney, when he took title to the Lee School property. *United States* v. *De Vasto,* 52 F. 2d 26, 30 (C. A. 2), certiorari denied, 284 U. S. 678.

In any event, prior to the time Shaffer testified, the Government had established a *prima facie* case of conspiracy between Weinberg and Bird. The proof was that Weinberg and Bird were stockholders, officers, and directors of the various schools named in the indictment (R. 242b); that Mercury had been organized and had sold tools and supplies to the schools (R. 3b, 7b); and that the prices fixed for these supplies were far above the figures at which the schools could have purchased them (R. 7b, 29a, 32a). It also had been proved that the sales of supplies by the Scott Company to the Crown Body and Fender School (later known as Parker) were rebilled, through Mercury, when Crown was purchased by petitioners, and that this was done solely for the purpose of fraudulently inflating the cost of the supplies to the school (R. 9b, 14b). Since a *prima facie* case had been established, the rule of *United States* v. *Bob,* 106 F. 2d 37, 40 (C. A. 2), certiorari denied, 308 U. S. 589, applied. As the court there held, an attorney's conversations and comunications with his client, occurring during the commission of the crime charged and in furtherance of it, are not privileged. See also *Clark* v. *United States,* 289 U. S. 1, 15.

5. (a) Petitioners contend that the trial court

committed prejudicial error in charging the jury that they must convict both defendants or acquit both (Pet. 22). The instruction reads as follows (R. 377a):

> May I say to you in this case that there are two defendants. You can not convict one and acquit the other. You must either acquit the two or none at all, or convict the two or none at all. In other words, one person alone can not commit conspiracy. If there was a conspiracy by two persons and those two persons were these defendants and you are convinced of their guilt beyond a reasonable doubt, you should say so by your verdict. *If you believe from the evidence in this case that one of the defendants was guilty of certain misconduct, criminal conduct, and the other wasn't, there is no conspiracy.* You must, to find conspiracy, have two or more persons working together to commit the particular offense * * *. [Emphasis added.]

To the extent that this charge precluded the jury from finding either petitioner guilty if he conspired with anyone other than the named co-defendant, it was, as the court below pointed out, favorable to the petitioners. And since the trial judge made it clear that if the jury found that one defendant was not guilty of misconduct there could be no conspiracy, it cannot be said, as in the cases cited by petitioners (Pet. 22-23), that the jury was not told to make a separate finding as to each defend-

ant's individual connection with the offense charged. See *United States* v. *McCann*, 32 F. 2d 540, 542 (C. A. 2), certiorari denied, 280 U. S. 559.

(b) Petitioners contend that in various respects the court's charge failed to deal with matters which the judge stated, during the course of the trial, that he would cover. Of the three matters which they single out (Pet. 24), one related to the jury's consideration, as against one defendant, of evidence involving the other (R. 57a). But this was in fact covered by the charge as follows (R. 374a):

> The act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking. All such responsibility of one for the other ends when the conspiracy ends.

A second complaint is that the court stated at one point (R. 62a) that it would discuss the attorney-client privilege. But this became unnecessary since, as pointed out *supra*, the attorney-client privilege was not applicable to Shaffer's testimony.

The third instance, relating to Weinberg's grand-jury testimony concerning Bird (R. 154b), presents a situation similar to that discussed in point 2, since Weinberg reaffirmed his grand-jury testimony (R. 156b).[3]

We note finally that petitioners submitted three

---

[3] As to other instances of alleged failure to charge (Pet. 24, n. 2), the Court of Appeals observed (Pet. App. 43) that the complaints were "inconsequential" and that most of the matters were "generally within the court's charge."

requests to charge and that these were in substance granted (R. 343a-344a). At the conclusion of the charge, the trial judge asked whether there was anything else petitioners wished him to cover (R. 409a, 414a, 417a, 422a). Petitioners made no further request. Certainly, they are in no position to seek reversal for failure to give an instruction not requested. Rule 30, F. R. Crim. P.; *Obery* v. *United States,* 217 F. 2d 860, 862 (C. A. D. C.); *Villaroman* v. *United States,* 184 F. 2d 261, 262 (C. A. D. C.).

6. Petitioners' argument that they were denied a fair trial (Pet. 25-27) is largely a reiteration of their prior arguments. Thus, the claim that they were denied the opportunity to prove that there was no Veterans' Administration regulation or federal statute forbidding the organization and use of a supply corporation (Pet. 27) is another version of the contention that there could be no conspiracy to defraud absent a plan to commit an offense defined independently of the conspiracy statute. The allegedly prejudicial and argumentative statement made by the court to the jury (Pet. 26) consists merely of the court's explanation as to why the veterans' receipts were excluded (R. 241a; see *supra,* p. 9). Similarly, their contention as to the receipts is presented anew as a claim that they were prevented from introducing rebuttal testimony (Pet. 27).

The other allegations of unfairness are equally unsubstantial. With regard to the court's allegedly improper interruptions of petitioners' counsel (Pet. 25), the record shows that petitioners

repeatedly attempted to inject collateral issues into the case (R. 351a-359a). Under the circumstances, it was both necessary and proper for the court to maintain control of the proceeding. *May* v. *United States,* 175 F. 2d 994, 1010 (C. A. D. C.).

The complaint that petitioner Weinberg was not permitted to explain an accountant's statement which the Government introduced in evidence (Pet. 27) actually relates to a ruling excluding a question as calling for a conclusion on the part of witness Weinberg (R. 311a).

The contention (Pet. 27) that petitioners "were not allowed to cross-examine Government witnesses to show that prices were administratively and unilaterally determined by Veterans' Administration, and that, therefore, there could be no conspiracy to defraud," is frivolous. It is quite true, as the school contracts themselves show (see R. 425a-456a), that the Veterans' Administration set maximum figures for reimbursement. It is also true that the Veterans' Administration had to pass on claims presented to it by the schools under the contracts—contracts which, so far as supplies were concerned, were of a cost-plus nature. It is also manifest, however, that fraudulent overstatement of the actual cost of school supplies would increase, *pro tanto,* the liability of the Government until the levels fixed by the contract maxima were reached.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

DECEMBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 366952 722